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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. AND
NATIONAL TRUCKING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA
AND
THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

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BRIEF OF APPELLANTS OPPOSING MOTIONS TO AFFIRM

Appellants file this their brief opposing motions to affirm, pursuant to Rule 16 (3) of the Revised Rules of this Court.

STATEMENT

Statement of the case is outlined on pages 4 through 6 of Appellants' Jurisdictional Statement as well as in the motions to affirm and need not be repeated here.

However, one *important* matter should be noted here. The instant case is one of several similar cases involving the same issues in widely scattered sections of the nation where similar action of the Commission is being challenged. In the footnote on page 4 of the Government's motion to affirm it is noted that eleven similar applications for modification have been filed with the Commission, five of which have been granted and six have been denied. Of the five which have been granted, at least four are definitely being challenged. As the Government notes, there are two such cases now on appeal in the United States District Court for the Western District of Oklahoma, *United Transports, Inc.* v. *United States* (Civil Action 65-118, W.D. Okla.) and *United Transports, Inc. and Clark Transport Company* v. *United States* (Civil Action 65-119, W.D. Okla.). The first of these involves a similar grant of authority to Commercial Carriers, Inc. and the second, a simlar grant to Kenosha Auto Transport Corporation. In both of these appeals, the District Court has by order dated April 8, 1965, *restrained the Commission* from making effective its orders until further order of the Court.

In another of the five applications granted by the Commission, *Commercial Carrier, Inc., Modification of Certificate*, Docket No. 43038, Sub No. 415, involving operations on the West Coast, the petition of protestant Convoy Company (dated April 28, 1965) is pending before the Commission for it to find that the

proceeding is one involving an issue of general transportation importance under the Commision's appellate procedures for reconsideration by the entire Commission. In this pending appeal to the entire Commission, protestant Convoy Company seeks that the modification not be finally determined until the Supreme Court has determined the instant case; but that in any event no certificate be issued implementing any modification until Convoy Company has an opportunity to seek relief in Court. Thus, should the Commission refuse to withhold implementation of the modification in that proceeding, an appeal in the District Courts on the West Coast will be brought.

Thus, the instant proceeding involving Dixie Transport Company, the two proceedings pending on appeal in the District Court for the Western District of Oklahoma and the one case still pending before the Commission on appeal on the West Coast accounts for four of the five applications which the Government indicates that the Commission has granted.

It is to be particularly noted that the District Court for the Western District of Oklahoma restrained the Commission from making effective its orders in the two cases, notwithstanding the reported decision of the District Court for the Northern District of Georgia, here on appeal.

The pendency of these various appeals in widely scattered areas of District Court jurisdiction is a particularly impelling factor for the Supreme Court to give plenary consideration to the substantial questions here before the Court.

ARGUMENT

The Government and the intervening appellees argue variously in support of their motions to affirm that the policy determination of the Commission announced in *National Auto. Transporters Association—Declaratory Order*, 91 MCC 395, was a proper procedural device for granting the new and additional operating authority to Dixie Transport Company but nowhere do they show that the Commission has complied with the applicable *statutory standards* requisite to the burden of proof upon an applicant for new authority to show proof of public convenience and necessity for a grant of new operating authority. They have carefully avoided the substantive issue of whether mere prior participation in traffic in another area under different circumstances under the *follow the traffic* theory, heretofore rejected by the Commission and the Courts, is lawful as the *sole criteria* for a finding of public convenience and necessity. They have carefully avoided the substantive facts that existing authorized carriers are meeting the needs of the public and that no shipper actually supports the need for nor indicates an intention to utilize the service authorized by the new certificate issued to Dixie Transport Company.

Certificates May Not Be Modified to Grant New and Additional Operating Authority Except Upon Proof of Public Convenience and Necessity

Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307) is controlling upon the power of the Interstate Commerce Commission to issue certificates of public convenience and necessity and limits this power in the following language:

> "* * * A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application,

> if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; * * * "

In the policy determination of the Commission in *National Auto. Transporters Association—Declaratory Order*, supra, the Commission clearly and specifically stated that a petition filed pursuant to the special procedure therein set up would be considered *in the same light as an application filed under Section 207(a) of the Act.* However, in spite of this asserted intention, the Commission actually ignored the requirements of the statute.

Although what we have here is called a modification of a certificate of public convenience and necessity, nonetheless there is involved an actual extension of operating authority and the grant of a new certificate of public convenience and necessity in fact. The very fact that the Commission itself took special note that a petition for modification would be considered in the same light as an application filed under Section 207(a) of the Act affirms that it well recognized that the act to be accomplished was the issuance of a new and additional operating authority not previously held by the carrier. There can be no serious contention but that the Commission granted to Dixie Transport Company a certificate authorizing it to perform the new and additional service which it was not previously authorized to perform. The statute is clear that the Commission is without authority to make such a grant of a new certificate except upon proof of public con-

venience and necessity. Cf. *United States* v. *Drum*, 368 U.S. 370, 373-374 (1962).

In its initial order dated October 7, 1963 (Appendix to the Government's motion to affirm, page 14), the Commission merely stated the ultimate finding "and good cause appearing therefor: We find that the present and future public convenience and necessity require that Certificate No. MC-88300 dated October 26, 1939 be modified as set forth * * *." This is a mere ultimate conclusion by the Commission not supported by the basic or essential findings as required by statute. Cf. *State of Florida, et al.* v. *United States*, 282 U.S. 194.

The "Policy Determination" In National Auto. Transporters Association—Declaratory Order, supra, Is No Lawful Substitute for Proof of Public Convenience and Necessity

In the final analysis the policy determination of the Commission in *National Auto. Transporters Association—Declaratory Order*, supra boils down to an arbitrary policy of the Commission to grant new operating rights such as it did to Dixie Transport Company based solely upon a carrier's prior participation in years past of traffic from a producing plant which no longer moves in motor carrier service from the producing plant. This is in utter disregard of the actual public convenience and necessity for the new operating authority in the new territory.[1] It ignores completely

[1] This is strikingly demonstrated here by the fact that the Commission has *twice* before recently found that Dixie Transport Company has failed to show public convenience and necessity for a similar service in the same area. Docket No. MC-88300 (Sub-No. 23), *Dixie Transport Company Extension—Florida*, decided April 18, 1961; and Docket No. MC-88300 (Sub-No. 27), *Dixie Transport Company Extension—Florida*, decided January 22, 1963; not reported in full.

the existence of carriers already holding appropriate authority to serve the railheads on ex-rail traffic in the new territory. No consideration whatever is given to the adequacy, abundance, or surplus of motor carrier service which may be already authorized to serve the railhead points. No consideration whatever is given to the effect which may result upon a carrier presently authorized to serve the railheads from a grant of the new and additional competition. No effect whatever is given to the needs of shippers for service from the railheads nor to the manner in which the traffic is presently moving from the railheads. None of the matters so firmly entrenched by statue and court decisions as to what constitutes proof of public convenience and necessity are given any consideration. The scheme devised by the Commission is arbitrary, not based upon permissible standards, has no rational basis, fails to accord due process of law, and is unlawful in violation of Section 207(a) of the Interstate Commerce Act and the National Transportation Policy. (49 U.S.C. 307 and preceding 301)

In attempted support of the Commission's reliance upon the *NATA* decision, the Government argues that the Commission acted in accord with certain decisions of this Court, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco*, 377 U.S. 33; and *National Broadcasting Co.* v. *United States*, 319 U.S. 190. It is contended that these cases hold that an administrative agency may validly determine in a rule-making proceeding certain issues that may be determinative, in part, of whether a license should be issued in any given case. Those cases do not support the position of the Government and the facts and circumstances there involved were entirely

dissimilar and distinguishable from those here before the Court.

The *Storer Broadcasting* case, supra, involved the situation where the Federal Communications Commission had, in a rule-making proceeding, determined that in the public interest a television license would not be granted if the applicant had an interest in as many as five existing stations. In all of these cases there was merely involved regulations couched in *prohibitory language.* In the *Storer* case, this Court merely said, at pages 203-4:

> "We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control."

The Court also noted at page 204 that in *National Broadcasting,* supra, similar rules *prohibiting* certain methods of chain broadcasting were upheld and that the *National Broadcasting* case validated numerous regulations couched in the *prohibitory* language of the present regulations.

At page 9 of its argument in support of motion to affirm, the Government says that this Court recently stated in the *Texaco* case, supra, "that the statutory requirements for a hearing under § 7 (of the Natural Gas Act) does not preclude the Commission from particularizing statutory standards through the rule-making process * * *." Most important however, is the fact that this quote taken out of context *leaves out* the most significant part of the quoted sentence. The completed sentence at page 39 is as follows:

> "that the statutory requirement for a hearing under § 7 (of the Natural Gas Act) does not pre-

> clude the Commission from particularizing statutory standards through the rule-making process *and barring at the threshhold those who neither measure up to them nor show reasons why in the public interest the rules should be waived.*" (Emphasis supplied)

Thus, all of the cases relied upon by the Government deal merely with certain *prohibitory* regulations barring those at the threshhold that do not measure up. That is not the situation which is here before this Court. The Court went on to say in *Texaco*, supra at page 45:

> "What the Commission did in these cases, however, is not an 'adjudication' not 'an order' not 'licensing' within the meaning of § 2. (of the Administrative Procedure Act) Whether Pan American can qualify for a certificate of public convenience and necessity has never been reached."

None of these cases support the proposition that the Commission could adopt the positive arbitrary determination that an applicant could qualify for a certificate of public convenience and necessity upon the *sole criteria* of mere prior participation in traffic in another area under different circumstances in complete derogation of well established standards for proof of public convenience and necessity.

The Government cites *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 and *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527 in support of its argument that the action of the Commission here was fully "responsive to the dynamic character of (the) transportation problems" and that the procedure followed by the Commission is consistent

with this Court's admonition that the public interest requires resolution of such problems through procedures which are both fair and efficient. Neither of these cases support the proposition that the Interstate Commerce Commission may abandon all well established standards for proof of public convenience and necessity and usurp the powers of the Congress by adopting an unlawful criteria and denying due process of law to existing carriers. The *Board of Trade* case, supra, involved a rail grain transit rate adjustment where there was a question of undue or unreasonable discrimination. In dealing with the rate-making process, this Court merely said that Congress has delegated enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. In the *Hunt* case, supra, this Court merely noted at page 527 the "nigh interminate" delay in certain rate proceedings before the Federal Power Commission and admonish that procedures should be developed to avoid such. There are no circumstances of "nigh interminate" delay having any bearing on the Commission's action in this case.

The Commission noted in the *NATA* decision its hope that "such petitions can be disposed of with a minimum of expense and effort for all concerned and perhaps without oral hearing." However laudable this expressed purpose may be, it is no excuse for departing from well established and controlling standards for proof of public convenience and necessity, the denial of due process of law, and ignoring the rights of existing carriers. The issue is not whether from a procedural standpoint the Commission could make a policy determination as such in the prior proceeding;

but, whether that policy determination is actually unlawful. This issue requires plenary consideration by this Court.

Appellants Are Not Collaterally Attacking the NATA Decision

It is variously argued in support of the motions to affirm, particularly by the intervening appellees, that the action of appellants here represents an improper collateral attack upon the policy determination of the Commission in the *NATA* decision. This argument has no merit.

First, it should be noted that the decision of the Commission in the *NATA* case was not actually pursuant to the rule-making procedures under the Administrative Procedure Act. The *NATA* proceeding, as its title clearly shows, was initially a *declaratory order* proceeding involving interpretation of operating rights. The Commission merely used this proceeding as the instrument for announcing its policy to modify existing certificates after it arrived at the conclusion that the carriers holding authority only from the producing plants would be unauthorized to handle shipments from railheads following rail movements.

But more important, there was no occasion for challenging the Commission's expressed policy in *NATA* because by its very terms it indicated that a petition for modification would be considered in the same light as an application under Section 207(a) of the Act. If that policy had been carried out as it was expressed, there would have been no necessity for challenging the lawfulness of that policy. At that time, the Commission had taken no steps to modify any certificates and had not issued the new and additional operating rights which it subsequently undertook to do.

This Court stated in *United States* v. *Storer Broadcasting Co.*, supra, at page 197:

> "Jurisdiction depends upon standing to seek review and upon ripeness. If respondent could not rightfully seek review from the order adopting the challenged regulations it must await action to its disadvantage under them."

Obviously, these appellants neither had standing to seek review nor was review ripe at the time the Commission first made public its policy. The Commission's announced policy was misleading in that it could not have been anticipated at that time that it would take the action which it later took. Appellants challenged that policy at their first opportunity following action to their disadvantage. This is not a collateral attack but is an attack directed against the issuance by the Commission of a new certificate of public convenience and necessity without proof of public convenience and necessity under the established and controlling standards.

The Action of the Commission Is Contrary to the Lower Court's Decision Rejecting the "Follow-the-Traffic" Doctrine

Appellants showed in their Jurisdictional statement, beginning at page 12, that the "follow-the-traffic" doctrine has been squarely rejected as a sole criteria for public convenience and necessity by both the Commission and a lower court in other cases. In *Smith & Soloman Trucking Co.* v. *United States,* 120 F. Supp. 277 (D.C.N.J. 1954), the Court clearly recognized that the primary test under the statute was to determine whether public convenience and necessity required the granting of an application. It held that the Commis-

sion must carefully weigh the *entire relevant situation.* In carefully weighing the *entire relevant situation,* the Commission must consider other carrier's rights and the National Transportation Policy, or in other words, the adequacy or inadequacy of existing service. In disposing of the *Dixie Transport* petition, the Commission gave consideration to none of these matters and certainly did not carefully weigh the *entire relevant situation* as it relates specifically to the service authorized to be performed by Dixie.

The Government argues at page 11 in support of its motion to affirm that the Commission's action in this case is not inconsistent with the doctrine that the Commission's action in this case is not inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow-the-traffic" of a particular shipper. It is stated that in the instant case the modification granted by the Commission expressly restricts Dixie's operations to traffic formerly hauled, so that no additional competition will be experienced by the existing carriers. This is contrary to fact. This completely ignores the facts of record showing that beginning in 1961 and subsequent thereto appellant National Trucking Company has responded to the shipper's needs under the authority which it has long held for service from the railheads, transporting a substantiality of that traffic and depending upon that traffic to sustain its operations in the face of the loss of other traffic which it previously handled prior to diversion of initial movements from production plants to railroad movements. Similarly, The Motor Convoy, Inc. has stood ready, willing and able to handle any traffic tendered.

The grant of authority to Dixie Transport would permit it to encroach on the rights of existing carriers and would permit it to divert traffic which the existing carriers have handled and upon which they depend for sustenance. The effect upon appellant National Trucking Company from the additional competition and diversion of traffic it is now transporting would be devastating. Here, there is no evidence of any shipper need for additional service and in fact the Chrysler Corporation letter attached to the petition of Dixie Transport Company, while not actually supporting any need on its part for the additional service nor dissatisfaction with present service, on the other hand actually affirms its dependence upon the existing carriers including National Trucking Company for fulfillment of its transportation needs.

The Government argues that by providing "the protection of other carriers serving the same points," the Commission obviated the necessity of taking evidence on the effect that the new authority would have on such carriers. However, the plain fact is that the Commission has provided no protection of other carriers serving the same points but has in fact authorized a new competitive service which threatens to strike at the very heart of the traffic which those carriers serving the same points are depending upon for their existence. In verified statements filed with the Commission with protests to the petition of Dixie Transport Company, the Commission did in fact have evidence before it of the effect that the new authority would have on appellants, but it arbitrarily gave no consideration to those facts.

Clearly, the Commission failed to consider the *entire relevant situation* which the statute and court decisions require that it must consider and its arbitrary grant of new and additional operating authority upon the *sole criteria* of prior participation in traffic in another area under different circumstances is squarely founded upon the so-called "follow-the-traffic" doctrine long rejected by the lower court.

This issue can be properly resolved only by plenary consideration by this Court.

CONCLUSION

Appellants have shown in their Jurisdictional Statement that this appeal presents questions which are so substantial as to require plenary consideration by the Court. This is just one of several cases where similar action of the Commission is being challenged as to its lawfulness. It has been shown that the District Court for the Northern District of Georgia did not come to grips with the real legal issue because of a misconception of the factual situation. There is every indication that the District Court for the Western District of Oklahoma will take a different view of the lawfulness of the Commission's action particularly in view of its having restrained the Commission's action in two cases even in the face of the published decision of the District Court for the Northern District of Georgia here on appeal. The argument in support of motions to affirm by the Government and the intervening appellees does not sustain the lawfulness of the Commission's action.

This Court should deny the motions to affirm, should note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the court below.

WHEREFORE, Appellants so pray.

Respectfully submitted,

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